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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 SHAW MORTGAGE CORPORATION
12 dba PATIOSOURCE & THE NATURAL
TOUCH, a California Corporation,
13
14 vs. Plaintiff,
15 PEERLESS INSURANCE COMPANY, et
al.
16 Defendants.
17

CASE NO. 08cv0709 BTM(AJB)

**ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

18 Plaintiff Shaw Mortgage Corporation dba Patiosource & The Natural Touch
19 ("Plaintiff" or "Shaw Mortgage") and Defendant Peerless Insurance Company
20 ("Defendant" or "Peerless") have filed cross-motions for partial summary judgment. For
21 the reasons discussed below, Defendant's motion is **DENIED** and Plaintiff's motion is
22 **DENIED**.
23

24 **I. FACTUAL BACKGROUND**

25 Since 1995, Steve and Jan Shaw (the "Shaws") have operated the Natural Touch
26 and Patio Source as joint operations. In 2003, the Shaws opened a showroom for the
27 stores in a rented retail space located at 9050 Kenamar Drive, San Diego, CA. The
28 Natural Touch sells decorations such as silk trees, plants, floral designs, and seasonal

1 decorations. The Natural Touch also engages in home design work. Patio Source
 2 showcases and sells high-end indoor and outdoor furniture and accessories. Both
 3 businesses are seasonal - Natural Touch has increased production and sales during the
 4 holiday and summer seasons, while Patio Source has increased sales in the spring and
 5 summer seasons.

6 On or about December 26, 2005, a fire completely destroyed the store and its
 7 contents. Soon after the fire, the Shaws opened a temporary store in an attempt to keep
 8 in business. The Shaws explain that even though they were able to work out of a
 9 temporary space, they suffered significant business losses due to the loss of, among
 10 other things, inventory, customer lists, marketing materials, and vendor contacts. The
 11 Shaws also explain that they were unable to fully participate in the buying seasons of
 12 spring and summer 2006 due to the lack of time, money and space, and the uncertainty
 13 regarding where and when the stores would be reopened.

14 The Shaws' landlord rebuilt the destroyed building on Kenamar Drive, and The
 15 Patio Source & The Natural Touch re-occupied the building in or about September 2006.
 16 On September 10, 2006, the businesses had their grand reopening.

17 18 **II. THE INSURANCE POLICY**

19 In September 2005, Peerless issued an insurance policy, Policy No. CBP-9772033
 20 (the "Policy"), to Plaintiff for the policy period of September 22, 2005 to September 22,
 21 2006. (Ex. 1 to Amato Decl.)

22 23 **A. Coverage**

24 The Policy's Business Income (and Extra Expense) Coverage Form provides: "We
 25 will pay for the actual loss of Business Income you sustain due to the necessary
 26 'suspension' of your 'operations' during the 'period of restoration.'" (Ex. 1 at Bates No.
 27 00134.)

28 "Period of Restoration" is defined as the period of time that begins 72 hours after

1 the time of direct physical loss or damage, and ends on the earlier of: “(1) The date when
 2 the property at the described premises should be repaired, rebuilt or replaced with
 3 reasonable speed and similar quality; or (2) The date when business is resumed at a new
 4 permanent location.” (Ex. 1 at Bates No. 00142.)

5 With respect to determining the amount of business income loss, the Policy
 6 provides:

7 c. We will reduce the amount of your:

8 (1) business income loss, other than Extra Expenses, to the
 9 extent you can resume your “operations” in whole or in part,
 10 by using damaged or undamaged property (including
 merchandise or stock) at the described premises or
 elsewhere.

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12 d. If you do not resume “operations,” or do not resume “operations” as
 13 quickly as possible, we will pay based on the length of time it would have
 taken to resume “operations” as quickly as possible.

14 (Ex. 1 at Bates No. 00139.)

15 The Policy also provides coverage for “Extended Business Income”:

16 If the necessary “suspension” of your “operations” produces a Business
 17 Income loss payable under this policy, we will pay for the actual loss of
 Business Income you incur during that period that:

18 (a) Begins on the date property (except “finished stock”) is
 actually repaired, rebuilt, or replaced and “operations” are
 resumed; and

19 (b) Ends on the earlier of:

20 (i) The date you could restore your “operations,”
 21 with reasonable speed, to the level which would
 22 generate the business income amount that
 would have existed if no direct physical loss or
 damage had occurred; or

23 (ii) 30 consecutive days after the date
 24 determined in (1)(a) above.

25 (Ex. 1 at Bates No. 00136.)

26 The Endorsement for Business Income Coverage - Actual Loss Sustained
 27 provides for the following Limits of Insurance: “We will pay for the actual loss of Business
 28 Income that you sustain that occurs within 12 consecutive months after the date of direct

1 physical loss or damage.” (Ex. 1 at Bates No. 00117.) The Retail Platinum Endorsement
2 (“Platinum Endorsement”) modifies the Limits of Insurance as follows: “The coverage
3 period limitation in this form of up to 12 consecutive months after the date of direct
4 physical loss or damage is changed to up to 15 consecutive months after the date of
5 direct physical loss or damage.” (Ex. 1 at Bates No. 00168.)

6 7 **B. Payments**

8 Peerless has paid a total of \$979,480.00 to Plaintiff for the loss of business
9 income. Peerless paid Plaintiff loss of business income benefits through September 10,
10 2006, when Plaintiff had its grand reopening. Peerless determined that the “Period of
11 Restoration” ceased upon Plaintiff’s grand reopening. Peerless paid Plaintiff an additional
12 30 days of business income loss through October 10, 2006, under the Extended Business
13 Income coverage of the Policy.

14 15 **III. DISCUSSION**

16 The issue before the Court on the cross-motions for partial summary judgment is
17 whether Plaintiff was entitled to payments for lost business income beyond October 10,
18 2006. Plaintiff contends that the Policy provides for the payment of lost business income
19 until the resumption of “normal business operations” – i.e., operations at normal volume –
20 and that, therefore, Plaintiff is entitled to payments through March 25, 2007 (15 months
21 after the fire). In contrast, Peerless contends that the 15-month coverage period is
22 subject to the “Period of Restoration,” which ended when Plaintiff resumed business at
23 the rebuilt property. According to Peerless, after the “Period of Restoration” ceased,
24 Plaintiff was only entitled to 30 additional days of lost business income under the
25 Extended Business Income provision. As discussed below, the Court finds that
26 Peerless’s interpretation of the Policy is the correct one, but that there is a triable issue of
27 fact regarding when the Period of Restoration ended.

1 A. Interpretation of Insurance Policies

2 Insurance policies are contracts to which the normal rules of contractual
3 interpretation apply. Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992).
4 The mutual intention of the parties is to be inferred, if possible, solely from the written
5 provisions of the contract. AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 821 (1990). If
6 the policy language is “clear and explicit,” it governs. Bank of the West, 2 Cal. 4th at
7 1264.

8 The court must interpret policy provisions “in context and give effect to every part
9 of the policy with each clause helping to interpret the other.” Palmer v. Truck Ins.
10 Exchange, 21 Cal. 4th 1109, 1115 (1999) (internal quotation marks and citations omitted).
11 “A policy provision is ambiguous only if it is susceptible to two or more reasonable
12 constructions despite the plain meaning of its terms within the context of the policy as a
13 whole.” Id. Only then does the court “invoke the principle that ambiguities are generally
14 construed against the party who caused the uncertainty to exist (i.e., the insurer) in order
15 to protect the insured’s reasonable expectation of coverage.” La Jolla Beach and Tennis
16 Club, Inc. v. Industrial Indemnity Co., 9 Cal. 4th 27, 37 (1994).

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18 B. Analysis

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20 1. Policy Interpretation

21 The Policy’s Business Income (and Extra Expense) Coverage Form explains that
22 coverage extends to “the actual loss of Business Income you sustain due to the
23 necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’” (Ex. 1 at
24 Bates No. 00134.) “Period of Restoration” is defined, in turn, as the period of time that
25 begins 72 hours after the time of direct physical loss or damage and ends on the earlier
26 of: “(1) The date when the property at the described premises should be repaired, rebuilt
27 or replaced with reasonable speed and similar quality; or (2) The date when business is
28 resumed at a new permanent location.” (Ex. 1 at Bates No. 00142.)

1 Peerless takes the position that under either of the definitions for the cessation of
2 the "Period of Restoration," the "Period of Restoration" ended on September 10, 2006,
3 when Plaintiff had its grand reopening at the rebuilt location. Peerless argues that
4 although the Platinum Endorsement extended the coverage period to 15 consecutive
5 months after the date of direct physical loss or damage, the "Period of Restoration"
6 limitation still continued to apply.

7 Plaintiff agrees that the "Period of Restoration" requirement was not eliminated by
8 the Platinum Endorsement's extension of coverage to 15 months. However, Plaintiff
9 contends that the "Period of Restoration" continues until the *resumption of operations at*
10 *the normal volume*.

11 Plaintiff's interpretation is not supported by the policy language. The definition of
12 "Period of Restoration" refers to the earlier of (1) "[t]he date when the property at the
13 described premises should be repaired, rebuilt or replaced with reasonable speed and
14 similar quality"; or (2) "[t]he date when business is resumed at a new permanent location."
15 The first part of this definition does not require the resumption of operations at all. See
16 Lava Trading Inc., v. Hartford Fire Ins. Co., 365 F. Supp. 2d 434, 443 (S.D.N.Y. 2005)
17 (holding that the "period of restoration" ended by April 30, 2002, when Lava had replaced
18 the property at its 83rd floor offices and had occupied its new location, and explaining that
19 the fact that Lava's back up data center was not fully operational by this date did not
20 extend the "period of restoration"). The second part of the definition refers to "when
21 business is resumed" at the new permanent location. Under its ordinary meaning,
22 "business" generally means "trade" or "commercial transactions" – there is no quantitative
23 aspect to the definition. Oxford English Dictionary (2d ed. 1989). Nowhere does the
24 Policy define "business" as meaning "business at the same volume as before."

25 In support of its position, Plaintiff points to the following provision: "If you do not
26 resume 'operations,' or do not resume 'operations' as quickly as possible, we will pay
27 based on the length of time it would have taken to resume 'operations' as quickly as
28 possible." (Ex. 1 at Bates No. 00139.) However, nothing in this provision creates a duty

1 on the part of the insurer to pay lost business income until the resumption of operations at
 2 *the normal volume*. In fact, the preceding paragraph of the Policy explains:

3 c. We will reduce the amount of your:

4 (1) business income loss, other than Extra Expenses, to the
 5 extent you can resume your "operations" *in whole or in part*,
 6 by using damaged or undamaged property (including
 merchandise or stock) at the described premises or
 elsewhere.

7 (Emphasis added.) In other words, when calculating the amount of lost business income
 8 that the insured is entitled to, the insurer determines whether the insured was able to
 9 resume operations *in whole or in part* prior to the expiration of the period of restoration .

10 The Extended Business Income provision bolsters the Court's conclusion that the
 11 term "resume business" or "resume operations" as used in the Policy includes the
 12 resumption of business at a reduced volume. Extended Business Income coverage
 13 begins "on the date property . . . is actually repaired, rebuilt, or replaced and 'operations'
 14 are resumed" and ends on the earlier of: "(i) The date you could restore your 'operations,'
 15 with reasonable speed, to the level which would generate the business income amount
 16 that would have existed if no direct physical loss or damage had occurred; or (ii) 30
 17 consecutive days after the date determined in (1)(a) above." (Ex. 1 at Bates No. 00136.)
 18 The fact that the extended business income coverage *ends* when operations are restored
 19 to a normal level means that it *begins* when "operations are resumed" at a reduced
 20 volume.

21 Furthermore, there would be no need for Extended Business Income coverage if
 22 the Policy generally provided for business income loss payments until the restoration of
 23 operations to a normal level. Clearly, the purpose of the Extended Business Income
 24 coverage is to provide a cushion for the time after the "Period of Restoration" when the
 25 insured is back in business but still not doing business at the same volume as before.

26 In its moving papers, Plaintiff argues that the 30-day period for Extended Business
 27 Income coverage was extended to a 15 month-period (after the date of direct physical
 28 loss) by the Platinum Endorsement. Plaintiff points to Section E ("Optional Coverages"),

1 Paragraph 4 ("Extended Period of Indemnity") of the Business Income (and Extra
2 Expense) Coverage Form, which states, "Under Paragraph A.5.c., Extended Business
3 Income, the number '30' in Subparagraphs (1)(b) and (2)(b) is replaced by the number
4 shown in the Declarations for this Optional Coverage." (Ex. 1 at Bates No. 00142.)
5 According to Plaintiff, the Platinum Endorsement was a Declaration for this Optional
6 Coverage.

7 Plaintiff's argument is unpersuasive. The Platinum Endorsement modifies the
8 Limits of Insurance set forth in the Endorsement for Business Income Coverage - Actual
9 Loss Sustained, as follows: "The coverage period limitation in this form of up to 12
10 consecutive months after the date of direct physical loss or damage is changed to up to
11 15 consecutive months after the date of direct physical loss or damage." (Ex. 1 at Bates
12 No. 00168.) This provision simply expands the coverage period for business Income
13 loss. Nothing in this provision eliminates the "Period of Restoration" limitation or other
14 requirements for recovery. Furthermore, neither this provision nor any other language in
15 the Platinum Endorsement mentions an extension of the 30-day period for the recovery of
16 Extended Business Income.

17 Supplemental briefing by the parties confirms that Plaintiff did not purchase the
18 optional coverage to extend the period of liability for the Extended Business Income.
19 (Def.'s Supp. Mem. of P. & A.) Indeed, Plaintiff now argues that the Extended Period of
20 Indemnity clause does not apply. (Supp. Affidavit of Jeff Byroads, ¶ 4.)

21 In summary, the Policy language clearly limits the recovery of business income
22 loss to the "Period of Restoration." The period of recovery ends either when the Period of
23 Restoration ceases or upon the expiration of the 15-month period set forth in the Platinum
24 Endorsement, *whichever comes first*. The Policy also clearly limits the period of recovery
25 for Extended Business Income to the earlier of the date when Plaintiff's operations were
26 restored to a normal level or 30 days after the resumption of business at the
27 repaired/rebuilt location. Because there is no ambiguity in the Policy on these points, the
28 insured's expectation of coverage does not come into play. La Jolla Beach and Tennis

1 Club, Inc., 9 Cal. 4th at 37.

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3 2. Estoppel/Reformation

4 An insurance agent's representations regarding coverage may have the effect of
5 expanding the coverage beyond what is actually provided by the policy, even in the
6 absence of ambiguity, under the theories of estoppel, see Hartford Fire Ins. Co. v.
7 Spartan Realty Int'l., Inc., 196 Cal. App. 3d 1320, 1325 (1987), or reformation, see R&B
8 Auto Ctr., Inc. v. Farmers Group, Inc., 140 Cal. App. 4th 327, 339 (2006). Jeff Byroads,
9 an agent for Wateridge Insurance Services who sold the Policy to Plaintiff, states that it
10 was Plaintiff's intention and his intention to provide coverage "that would make the Shaws
11 whole in the event of a covered interruption until the Shaws could return to normal
12 business operations." (Byroads Decl. (Pl.'s Ex. 6) ¶ 4.) Byroads also declares: "I ordered
13 the Policy and the Endorsement with the intention to adequately insure the Shaws so that
14 in the event of a covered peril, they would be restored to the same position as they
15 occupied prior to the disaster," and "I ordered the Policy and the Endorsement with the
16 intention to provide coverage for extended business income loss for up to a fifteen month
17 period of time." (Id. at ¶¶ 5-6.)

18 Byroads' general statements about his intentions are insufficient to support a
19 finding of estoppel or reformation. Byroads does not claim that he made any specific
20 representations to Plaintiff that (1) regardless of the "Period of Restoration" limitation,
21 Plaintiff would be covered for business income loss throughout the 15 month period until
22 normal operations were restored; or (2) the 30-day time period for the recovery of
23 Extended Business Income would be extended until normal operations were resumed.
24 Therefore, Plaintiff has not established that it reasonably relied on representations by
25 Peerless's agent that the Policy would cover lost business income up until the time
26 Plaintiff's operations were restored to a normal level.

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1 3. Application of Policy to Facts of this Case

2 Although the Court agrees with Peerless's interpretation of the Policy, the Court
3 finds that there is a triable issue regarding when the Period of Restoration expired. The
4 definition of "Period of Restoration" refers to the earlier of (1) "[t]he date when the
5 property at the described premises should be repaired, rebuilt or replaced with
6 reasonable speed and similar quality"; or (2) "[t]he date when business is resumed at a
7 new permanent location."

8 It is unclear whether the second part of the definition applies when business is
9 resumed at a new building at the *same* geographical location, or whether business must
10 be resumed at a *different* geographical location. The parties did not brief this issue.
11 Therefore, the Court looks to the first part of the definition.

12 Under the first part of the definition, the pertinent inquiry is when the property at
13 the described premises should be repaired, rebuilt, or replaced. In addition to the
14 building, Plaintiff claims that the fire destroyed merchandise, back stock, raw supplies,
15 marketing materials, photographs, displays, vendor contacts, customer lists, and other
16 valuable papers. (Plaintiffs' Decl. ¶ 13.) It is unclear from the record before the Court
17 whether the items listed by Plaintiff constitute covered property under the Policy and, if
18 so, when such property reasonably should have been replaced. It is possible that Plaintiff
19 resumed business before such time that its covered property was or should have been
20 replaced.¹ Therefore, there is a triable issue of material fact regarding whether the Period
21 of Restoration ended before, at the same time as, or after the grand reopening on
22 September 10, 2006.

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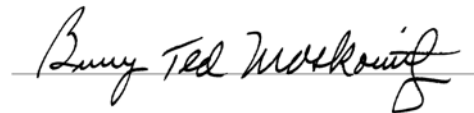
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28 ¹ The Court notes that it interprets the Policy as referring to the repair, rebuilding, or replacement of the property *that was destroyed by the fire*, not stock or other property that could have been obtained had the fire not occurred.

1 **IV. CONCLUSION**

2 For the reasons discussed above, Plaintiff's motion for partial summary judgment
3 is **DENIED** and Defendant Peerless Insurance Company's motion for partial summary
4 judgment is **DENIED**. Counsel for the parties shall appear before Magistrate Judge
5 Battaglia at the Case Management Conference currently scheduled for **May 26, 2009 at**
6 **9:30 a.m.**

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8 **IT IS SO ORDERED.**

9 DATED: May 11, 2009

10 
11 Honorable Barry Ted Moskowitz
12 United States District Judge
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